Roger D. Hughes d/b/a Roger D. Hughes Drywall *and* Carpenters Local 751, United Brotherhood of Carpenters & Joiners of America. Cases 20–CA–30729, 20–CA–30729–2, and 20–CA–30999

March 31, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 13, 2003, Administrative Law Judge Burton Litvack issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleged that the Respondent violated Section 8(a)(1) by: (a) physically assaulting two pickets; (b) threatening to cause the arrest of a picket; and (c) subsequently causing the arrest of that picket. We conclude that, because the Union was engaged in lawful area standards picketing on public property, the Respondent, by assaulting one picket and by threatening and causing the arrest of another, interfered with employees' Section 7 rights, thus violating Section 8(a)(1).

1. Facts

The Respondent, a sole proprietorship owned by Roger D. Hughes, performs drywall work in California. Roger's son, Ryan, is employed as the Respondent's estimator. The Respondent's office, once a residence, is located on a quiet cul-de-sac.

In November 2001, two union field representatives, Joe Hart and Aaron Hadzess, began area standards picketing on the sidewalks in front of, and on the side of, the Respondent's office. Five to 10 picketers generally picketed the Respondent's office 5 days per week. The pickets were paid by the Union; none were the Respondent's employees. The complaint alleged four deliberate acts of misconduct, committed by Roger and Ryan Hughes, against individual pickets on three separate dates.

The first alleged act was a deliberate assault on picket Eric Torguson by Roger Hughes on June 13, 2002. The judge found that "some sort of collision" occurred between Hughes and Torguson, but discredited Torguson's, Hadzess' and picket Sean Yellig's accounts that Hughes deliberately charged after and struck Torguson.[1]

The second and third alleged acts occurred on June 21, 2002. Ryan Hughes testified that, when he drove up to the office, he observed a picket, Yellig, near the wheel well of his father's truck. According to Ryan, he ran around the side of the truck, and saw Yellig zip up his pants and a pool of urine on the ground. Yellig testified that Ryan asked him what he was doing and that he (Yellig) did not respond. Ryan testified that he then went into the office, told his father what he had observed, and called his attorney and the police. According to Yellig, a few minutes later, Roger Hughes stepped outside of the office and yelled at the picketers to stay away from his truck. According to Hadzess, Roger Hughes came outside again about 10 minutes later and said he was going to call "the cops." At least 1 ½ hours later, a police officer arrived to investigate. Yellig denied that he had urinated in that spot, stating that he had earlier been granted permission to leave the picket line to ride his bicycle to a nearby restaurant to use the restroom. Yellig explained to the officer that he had just returned from the restaurant and was locking his bicycle to the guardrail when Ryan drove up. The officer smelled the spot, and told Ryan that he did not smell any urine. Nonetheless, Ryan insisted that Yellig be arrested, and the officer accepted the citizen's arrest. The city attorney declined to issue a complaint.

The judge credited Yellig's denial that he had urinated in the area. The judge further found that Ryan Hughes instigated the arrest and citation of Yellig without cause. The judge also noted that Roger Hughes did not deny Hadzess' testimony that he (Roger) had threatened to have Yellig arrested. Because the judge found that Yellig had not engaged in public urination, he further found that Roger Hughes' threat to call the police was both without cause and a condonation of his son's act.

The fourth alleged act occurred on November 5, 2002.[2] The judge credited Hadzess' testimony that, as he was picketing on the sidewalk alongside William Reed, Ryan Hughes approached Hadzess, put out his right shoulder so as to strike Hadzess' right shoulder, and thereby caused Hadzess to stumble. The judge discredited

[1] The General Counsel does not except to the judge's finding that this act did not occur as alleged. Accordingly, we adopt the judge's recommendation to dismiss complaint paragraph 6(a).

[2] The judge refers to this as the "third" act (it is the third date of alleged misconduct). However, it is clear from the complaint (and from the judge's discussion elsewhere) that the four alleged acts of misconduct are: (1) Roger Hughes' physical attack on Torguson on June 13, (2) Roger Hughes' threat to have Yellig arrested on June 21, (3) Ryan Hughes' insistence that Yellig be arrested, also on June 21, and (4) Roger Hughes' physical attack on Hadzess on November 5.

Ryan's testimony that Hadzess and Reed had cut off his path. The judge found that Ryan Hughes' act was deliberate, unprovoked, and "nothing less than a battery against Hadzess."

Finally, the judge noted the backdrop against which these acts occurred. Thus, the judge cited Hadzess' uncontradicted testimony that Roger Hughes swore or cursed at the pickets while they picketed and engaged in an "act of lewd and lascivious conduct" in full view of the pickets in March.

2. Judge's decision

While finding that Ryan Hughes engaged in misconduct as alleged,[3] the judge concluded that the Respondent did not violate Section 8(a)(1). The judge found that the Union's signs demonstrated that it was engaged in "area standards picketing," and that "'properly conducted area standards picketing' constitutes activity protected by Section 7 of the Act." Nevertheless, the judge explicitly rejected the General Counsel's theory that, because the Union's area standards picketing was protected, the pickets were engaged in protected activity, thereby conferring upon them a right not to be subjected to the chilling effect of witnessing, or being the object of, coercive conduct.

In finding no violation, the judge reasoned that none of the precedent relied upon by the General Counsel involved "employer actions, not specifically related to the protected concerted activity, perpetrated against individual pickets or handbillers; rather, each concerns employer action directly against a labor organization concerning a protected concerted activity in which the labor organization had been involved." In this connection, the judge found that there was no record evidence that the Respondent's actions were related to, or in retaliation for, the Union's area standards picketing. The judge further found that the nonemployee union representatives were not "employees" under the Act, stating they were more "akin to agents." The judge stated that the Section 7 right to engage in lawful area standards picketing belonged to the Union, and that the pickets' protection derived from the labor organization's right. Thus, according to the judge, unlike an attack upon a labor organization itself, deliberate acts of misconduct directed against a picket, for reasons not clearly related to the protected activity itself, do not necessarily detrimentally impact upon the Section 7 rights of employees generally. The judge acknowledged that misconduct directed against a nonemployee representative could violate Section 8(a)(1) if witnessed by employees, but found no violation here because no employee witnessed the misconduct. Accordingly, the judge recommended dismissal of the complaint.

3. General Counsel's exceptions

The General Counsel excepts to the judge's failure to find that the Respondent violated Section 8(a)(1) by interfering with the Union's Section 7 right to engage in area standards picketing. The General Counsel argues that the judge failed to consider the harm a union itself suffers when its picketers are wrongfully subjected to threats of arrest, actual arrest, and physical assault. According to the General Counsel, there is no basis for the distinction made by the judge: if, as the Board has found, an employer's interference with protected area standards picketing violates a union's Section 7 rights, it follows that an employer also violates the Act when it takes other actions that interfere with the picketers while they picket. Because the picketers here were engaged in protected area standards picketing, the picketers had a right not to be attacked for engaging in picketing. That protection applied despite the fact that the picketers were nonemployee union representatives, rather than the Respondent's own employees.

The General Counsel also excepts to the judge's failure to find that Roger Hughes' threat to call the police was unlawful. Citing *Winco Foods*, 337 NLRB 289, 293 (2001), question certified by *Waremart Foods v. NLRB*, 333 F.3d 223 (D.C. Cir. 2003), opinion after certified question declined *Waremart Foods v. NLRB*, 354 F.3d 870 (D.C. Cir. 2004), the General Counsel argues that the threat to call the police was tantamount to a threat of arrest.

Finally, the General Counsel excepts to the judge's failure to find that Ryan Hughes' instigation of Yellig's arrest and Hughes' assault of Hadzess were not related to the Union's protected activity. The General Counsel maintains that the record is replete with evidence that both Roger and Ryan Hughes shared an "antiunion virulence" that led to their acts of misconduct in retaliation for the picketing.

4. Analysis

We find merit in the General Counsel's exceptions.

The judge found that the picketing occurred "*on the public sidewalk* outside Respondent's office facility on behalf of the Union" (emphasis added). The judge also found that the picketing was area standards picketing and was protected, concerted activity. The Respondent has filed no exceptions and thus we treat these findings as conclusively established. Where public property is con-

[3] The judge imputed responsibility for Ryan's acts to the Respondent on the bases that: (1) Ryan Hughes was the Respondent's agent, and (2) Roger Hughes, by his threat to have Yellig arrested, condoned Ryan's actions as to the arrest and citation of Yellig. The Respondent filed no exceptions.

cerned, "[I]t is beyond question that an employer's exclusion of union representatives . . . violates Section 8(a)(1), so long as the union representatives are engaged in activity protected by Section 7. . . ." *Bristol Farms*, 311 NLRB 437 (1993), citing *Gainesville Mfg. Co.*, 271 NLRB 1186 (1984). Here, because the pickets were on public property, and because they were engaged in protected, concerted activity, it follows that the Respondent violated Section 8(a)(1) if it threatened to have, and/or had, the pickets arrested for that activity.

Nevertheless, the judge found no violation. He relied upon two erroneous determinations: 1) the pickets were not employees, and (2) as to one of the pickets (Yellig), the action taken against him was not in response to the picketing.

As to the first point, the Union was picketing to protect the area standards of employees whom it represented. This is clearly activity protected by Section 7. Hadzess and Yellig were acting as the Union's agents in carrying out this activity on behalf of employees represented by the Union. The Board has found Section 8(a)(1) violations based on employer's actions such as calls to police, threats and attempted arrests, and harassment with water sprinklers directed against area standards picketers and union agents without reference to whether these actions were witnessed by any of the employer's statutory employees. See *Corporate Interiors*, 340 NLRB No. 85, slip op. at 14–16 (2003), citing, inter alia, *Bristol Farms*, above. See also *Petrochem Insulation, Inc.*, 330 NLRB 47, 49 (1999), enfd. 240 F.3d 26, 29 (D.C. Cir. 2001) (union's area standards activity on behalf of employees whom it represents is protected activity). Therefore, the Respondent's actions attempting to and interfering with Hadzess' and Yellig's area standards picketing, by, respectively, committing battery and threatening and causing arrest, violated Section 8(a)(1) without regard to whether these actions were witnessed by any of the Respondent's employees.

With respect to Yellig, we note that the judge: (1) credited Yellig's testimony that he did not urinate; (2) found that Roger Hughes "fabricated" the incident to instigate Yellig's arrest; and (3) found that Roger Hughes' threat to arrest Yellig and Ryan Hughes' insistence that Yellig be arrested were "without cause." Those findings are tantamount to a finding that the Respondent's reason for seeking Yellig's arrest was baseless and pretextual. Thus, we believe, a fair inference can be drawn that the Respondent was actually attempting to interfere with the Union's lawful picketing. See *Petrochem Insulation, Inc.*, 330 NLRB 47 (1999), enfd. 240 F.3d 26 (D.C. Cir. 2001), cert. denied 534 U.S. 992 (2001) (finding violation of Sec. 8(a)(1) by inferring, based on circumstantial evidence, a retaliatory motive behind respondent's filing of lawsuit). Moreover, we believe that inference is buttressed by the evidence of both Roger and Ryan Hughes' animosity towards the Union's picketing, including Roger Hughes' swearing at and engaging in lewd conduct in front of the pickets. Thus, contrary to the judge, we find that the evidence clearly establishes a causal relationship between the Respondent's conduct and the Union's protected area standards picketing. Viewed in that context, both Roger Hughes' threat to call the police and Ryan Hughes' demand that Yellig be arrested violated Section 8(a)(1).[4]

5. Remedy

Having found that the Respondent violated the Act, the Board must determine the appropriate remedy. Consistent with our precedent and with the General Counsel's request here, we will order the Respondent to post a notice in the Respondent's place of business and to provide the Union with signed and dated copies of the notice for posting. See *Winco Foods*, above, 337 NLRB at 294 (2001) (approving a posting remedy even when no indication that respondent's employees were directly affected). In addition, we will order the Respondent to make the Union whole with respect to the litigation costs arising out of Yellig's arrest, and to notify the appropriate law enforcement and court authorities of the illegality of the arrest and to seek the expungement of associated records. *Schear's Food Center*, 318 NLRB 261, 267 (1995)(ordering that the respondent make the union representative "whole with interest for all reasonable legal fees and expenses incurred as a result of the arrest," and that it also notify the sheriff's office and court authorities that the Board had determined that the arrest violated the Act, and request that the department and the court expunge any and all records of that unlawful arrest); *K Mart Corp.*, 313 NLRB 50, 58 (1993); *Baptist Memorial Hospital*, 229 NLRB 45, 46 (1977), affd. 568 F.2d 1 (6th Cir. 1977). See also *Petrochem Insulation, Inc.*, 240 F.3d 26, 35 (D.C. Cir. 2001) (holding that the Board did not abuse its discretion in ordering the respondent to reimburse the unions for all legal and other expenses incurred in defending against lawsuits because the award related not to the respondent's loss of its suit, but to the fact that the suit itself was an illegal act).

[4] *Corporate Interiors*, above.

An employer may, of course, seek police assistance in response to reasonable, good faith concerns regarding picketer misconduct. *Great American*, 322 NLRB 17, 21 (1996). However, in the instant case, Ryan Hughes "fabricated" the incident to instigate Yellig's arrest, as distinguished from acting on a good faith, albeit erroneous, belief that the incident occurred.

ORDER

A. The Respondent, Roger D. Hughes, d/b/a Roger D. Hughes Drywall, Santa Rosa, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act by physically assaulting, threatening to cause the arrest of, and causing the arrest of picketers lawfully engaged in area standards picketing as employees or representatives of Carpenters Local 751, United Brotherhood of Carpenters & Joiners of America.

(b) In any like or related matter interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify the Santa Rosa City Attorney's Office and appropriate court authorities in writing, with a copy to the Union, that the National Labor Relations Board has determined that Yellig's arrest on June 21, 2002, violated the National Labor Relations Act; request in writing, with a copy to the Union, that the City Attorney's Office and the court remove any and all records of that unlawful arrest; and make Carpenters Local 751, United Brotherhood of Carpenters & Joiners of America whole, with interest, for all reasonable legal fees and expenses incurred as a result of the arrest.

(b) Within 14 days after service by the Region, post at its Santa Rosa, California, office, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.

(c) Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 21, 2002.

(d) Sign and return to the Regional Director sufficient copies of the notice for posting by the Union, if it so chooses, at places where it customarily posts notices to its members and employees it represents.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 31, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act by physically assaulting, threatening to cause the arrest of, and causing the arrest of picketers lawfully engaged in area standards picketing as employees or representatives of Carpenters Local 751, United Brotherhood of Carpenters & Joiners of America.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related matter interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL notify the Santa Rosa City Attorney's Office and appropriate court authorities in writing, with a copy to the Union, that the National Labor Relations Board has determined that Yellig's arrest on June 21, 2002, violated the National Labor Relations Act; WE WILL request in writing, with a copy to the Union, that the City Attorney's Office and the court remove any and all records of that unlawful arrest; and WE WILL make Carpenters Local 751, United Brotherhood of Carpenters & Joiners of America whole, with interest, for all reasonable legal fees and expenses incurred as a result of the arrest.

ROGER D. HUGHES DRYWALL

Michael L. Smith, Esq., for the General Counsel.
Mark D. Jordan, Esq. (Jordan, Dexter & Leonard), of Santa-Rosa, California, for the Respondent.
Aaron Hadzess, of Santa Rosa, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK Administrative Law Judge. The unfair labor practice charge in Case 20–CA–30729–1 was filed by Carpenters Local 751, United Brotherhood of Carpenters & Joiners of America, herein called the Union, on June 18, 2002;[1] the unfair labor practice charge in Case 20–CA–30729–2 was filed by the Union on June 24, 2002; and the original and amended unfair labor practice charges in Case 20–CA–30999 were filed by the Union on December 19, 2002 and January 17, 2003, respectively. After an investigation of each of the above unfair labor practice charges, on January 30, 2003, the Regional Director of Region 20 of the National Labor Relations Board, herein called the Board, issued an amended consolidated complaint, alleging that Roger D. Hughes d/b/a Roger D. Hughes Drywall, herein called Respondent, engaged in, and continues to engage in, unfair labor practices within the meaning of Section 8(a)(1) of the National Labor Relations Act, herein called the Act. Respondent timely filed an answer, denying the commission of the alleged unfair labor practices. As scheduled by a notice of hearing, the above-stated matters came to trial before the above-named administrative law judge on February 18 and 19, 2003, in Santa Rosa, California. At the trial, all parties were afforded the opportunity to call witnesses in their behalf, to examine and to cross-examine witnesses, to offer into the record all relevant documentary evidence, to argue their legal positions orally, and to file post-hearing briefs. Counsel for the General Counsel and counsel for Respondent filed post-hearing briefs, and said documents have been carefully considered. Accordingly, based upon the entire record herein, including the post-hearing briefs and my observation of the testimonial demeanor of each of the several witnesses, I issue the following.

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Respondent, a sole proprietorship owned by Roger D. Hughes, has maintained an office and place of business in Santa Rosa, California, and has been engaged in business in the building and construction industry as a drywall contractor. During the 12-month period ending July 31, 2002, Respondent, in conducting its business operations described above, performed services, valued in excess of $50,000, for entities in the State of California, including Christopherson Homes and Riverside Homes, which meet a Board standard for the assertion of jurisdiction on a direct basis. Respondent admits that, at all times material herein, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that, at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

The amended consolidated complaint alleges that Respondent engaged in four separate acts, violative of Section 8(a)(1) of the Act. Thus, the General Counsel contends that Respondent unlawfully interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act by physically assaulting pickets outside of its office facility on two occasions, by unlawfully threatening to cause the arrest of a picket, and by unlawfully causing the arrest of a picket. Respondent denied the commission of the alleged unfair labor practices, asserting that the physical contacts with pickets were accidental in nature and that the arrest of a picket was for cause.

IV .THE ALLEGED UNFAIR LABOR PRACTICES

A The Facts

Respondent is a sole proprietorship owned by Roger D. Hughes and is engaged in business in the building and construction industry as a drywall contractor, performing only interior drywall, taping, texturing, and clean-up work primarily in the north San Francisco Bay area of California. The record establishes that Hughes is responsible for all hiring and firing, payroll, and supervising the work of his employees[2] and that, besides Respondent's craft employees and an office secretary, the only other employee is Hughes' son Ryan, who works as Respondent's estimator.[3] In this regard, Ryan Hughes, who maintains a personal office and desk in Respondent's office facility, finds available jobs, determines the amount and cost of

[1] Unless otherwise stated, all dates herein occurred during calendar year 2002.

[2] Respondent admits Roger Hughes is a supervisor within the meaning of Section 2(11) of the Act.

[3] The amended consolidated complaint alleges, but Respondent denies, that Ryan Hughes has been Respondent's agent at all times material herein.

the materials and labor for the jobs, and prepares bids, which he signs on behalf of Respondent, for the work.[4] In addition, Ryan is in charge of the materials inventory for Respondent and does customer service work. While Ryan denied ever giving work instructions to employees while his father is away on vacation or for any other reason,[5] his father contradicted him. Thus, asked if he would swear his son never assigns work, Roger Hughes responded, "No, I'm not saying that. He might have at one time by me telling him or me being out of town, me telling him to send this certain person to go do this job. He does instruct them on these things, but I'm the one that makes all the decisions."[6] The record further establishes that Respondent's office facility is located at 100 Ridgeway Avenue in Santa Rosa, California; that Ridgeway Avenue ends in a cul-de-sac bordered on the east by the 101 Freeway[7] and on the west by Cleveland Avenue; that Respondent's property is at the corner of Ridgeway and Cleveland Avenues with one other building between Respondent's office facility and the end of the cul-de-sac;[8] that the latter building is separated from both streets by an 8 ft. sidewalk; that on the east side of Respondent's office facility on Ridgeway Avenue is a driveway, which runs from the street back to the rear of the building; that a grass lawn, which begins at the edge of the driveway, covers the area between the sidewalks on Ridgeway and Cleveland Avenues and the building itself; and that a paved walkway, which bisects the front lawn, runs from the sidewalk on Ridgeway Avenue to the front door of the office facility.

The record reveals that Union field representatives, Joe Hart and Aaron Hadzess, commenced an area standards investigation of Respondent after encountering it on a model homes construction project in Santa Rosa in early November 2001 and that the Union's area standards investigation consisted of speaking to Respondent's employees, obtaining pay stubs from them, and comparing their rates of pay and benefits with those set forth in the Union's master labor agreement for drywall work performed in Northern California and with the rates of pay and benefits of employees employed by the only union signatory drywall contractor in Sonoma County. After the Union's agents convinced themselves that the rates of pay and the benefits paid to Respondent's employees were beneath the Union's area standards, those set forth in the above master labor agreement, representatives of the Union commenced picketing on the sidewalks in front and on the side of Respondent's office facility later in November 2001. The record further reveals that said picketing is on-going and is usually conducted 5 days a week from 7 or 8 in the morning until 1 or 2 in the afternoon and that the pickets, who usually number between five and ten,[9] carry identical signs, reading "R.D. Hughes [does] not pay standard wages established by Local 571 . . . in this area."[10]

The instant matters concern four alleged deliberate acts of misconduct, committed by Roger Hughes and Ryan Hughes against individual pickets. At the outset, while conceding that there have been verbal exchanges between Roger Hughes and the pickets, including himself, "on a fairly regular basis," Aaron Hadzess testified that, on occasion, he has heard Roger Hughes "swearing or cursing" at the pickets while they have marched in front of Respondent's office facility. Hadzess further testified regarding an alleged act of lewd and lascivious conduct, committed by Roger Hughes in full view of the pickets, one day in March. According to him, while standing in the driveway of his office facility, Hughes reached into his pick-up truck and pulled out a black jacket with "Local 571" printed on the back, and "then, while holding the jacket in his right hand, he [exposed his penis] and he rubbed the jacket all over it." Hughes failed to deny the occurrence of such an incident. In any event, the first alleged unlawful incident herein occurred on June 13. Eric Torguson, an individual who has engaged in picketing on behalf of the Union for many years, testified that he was picketing in front of Respondent's office facility that day along with Hadzess, Hart, Sean Yellig, and Valerie Vasquez and that, at approximately 9 am, he became aware of a verbal confrontation between Hart and Roger Hughes. According to Torguson, at the time he became aware of the confrontation, Hughes was on Respondent's front lawn, turning off the sprinkler system, the control valves for which are located in the corner of the lawn and close to the driveway, and Hart, who had been marching in front of Torguson toward the driveway, had stopped walking and was standing near the walkway to the front door. Both men were cursing at each other, and ". . . Hughes was saying that he would like to see more good-looking women come to the line and then I said 'Don't say that. [It] would be considered sexual harassment of some kind.'" Hughes replied with an expletive, and Torguson retorted, saying Hughes was now harassing him and asking him to stop cursing at him. Apparently paying no attention to Torguson's request, Hughes continued cursing at him, and, after calling Torguson "a pansy," began running diagonally across the grass

[4] Ryan Hughes stated that his father has altered bid proposals. According to Roger Hughes, his son ". . . is nothing but an estimator," and, if a bid is accepted by a contractor, Roger Hughes is the only individual authorized to sign a contract for the work on behalf of Respondent.

[5] According to Ryan, "I don't deal with . . . employees. I deal with customers."

[6] Roger Hughes conceded he passes on instructions to employees through his son—"That could happen," but "I don't know a specific time what you are talking about."

[7] A 4 or 5 ft. high guardrail separates the cul-de-sac from the freeway, which is a heavily traveled north/south highway.

[8] The other building is a private residence, owned by Jack Tilton, a self-described semi-retired shoe repair worker. From the street, Respondent's office facility resembles a private residence.

[9] Aaron Hadzess and Joe Hart have been in charge of the picketing, and one or both is always present. None of the pickets are employees of Respondent, and the, individuals, who are engaing in the picketing, are paid for their services by the Union.

[10] While the Union engaged in picketing in front of Respondent's office facility, it also engaged in handbilling at several jobsites on which employees of Respondent were working. In this regard, at the hearing, union agents termed this informational handbilling and identified four handbills, which were distributed. One mentions the instant amended consolidated complaint against Respondent, two contain the Union's assertion that Respondent is paying its employees wages and benefits below the area standard, and one discusses the filing of an allegation of "indecent exposure" against Roger D. Hughes and a police report on such an incident.

toward the picket. With Hughes 15 to 20 feet from him, Torguson[11] noticed Hughes moving toward him, turned toward Cleveland Avenue, and, "because I was afraid he was coming after me," began "moving fast" in that direction. Without looking behind him and after taking no more than "half a dozen" steps,[12] Torguson suddenly felt his picket sign being knocked from his shoulder and ". . . some kind of a karate chop or slap . . . from behind." He stumbled but recovered his balance without falling and observed Hughes walking in the street toward his truck after striking him.

Two other witnesses assertedly corroborated Torguson's account of the alleged intentional assault and battery against him by Hughes. Aaron Hadzess testified that, at approximately 9 or 10 in the morning, the pickets[13] were all marching in front of Respondent's office when Roger Hughes walked outside and onto the paved walkway and called to Joe Hart, saying he should get more "good-looking bimbos" to picket. He added that he meant to say "women" and wouldn't mind the picketing then. Hart replied, accusing Hughes of engaging in sexual harassment, and Hughes responded, saying "fuck you, Joe" and there was nothing Hart could do about it. Then, according to Hadzess, Hughes began walking toward the sidewalk, turned right, and continued walking toward the driveway where his truck was parked. He turned into the driveway, "and I believe he either got something out of the cab of the truck or he opened up the back of his truck which has a . . . solid cover on the back." Torguson, who was waking in front of Hadzess, suddenly yelled to Hughes that he should stop using such language because it could be considered sexual harassment, and Hughes replied, "Fuck you, punk." At this point, Hughes ". . . turned around and started walking along the sidewalk . . . towards the pathway. And, at that time, Eric Torguson was probably 7 or 8 ft. in front of Mr. Hughes," moving in the same direction with his back to Hughes. Variously describing Hughes either as "moving quickly" or "running" toward Torguson and with "his fists clenched . . . and his arms . . . swinging a bit," Hadzess asserted he was forced to move out of his way or be "run into" by Hughes. Then, catching up to Torguson, who was unaware of the onrushing Hughes, the latter ". . . swung [his right hand] at Eric . . . in an attempt to move him out of the way. Mr. Hughes with his closed fist [struck Torguson's] left shoulder, hitting the picket sign into Torguson's head and his fist went off his right shoulder and hit Torguson in the back of the neck. Eric stumbled and Mr. Hughes . . . had reached his pathway and into the office and, swearing and cursing, went into the office."[14] During cross-examination, Hadzess embellished his account, now describing Hughes as walking quickly in pursuit of Torguson with ". . . his head down like a charging bull." Also, Sean Yellig, who has picketed in front of Respondent's office facility for the Union since January, testified that he witnessed the incident, stating that he was picketing that morning along with Joe Hart, Torguson, Hadzess, and Valerie Vasquez. At approximately 8 am, according to Yellig, Hughes appeared on the front steps of his office facility and yelled to Hart, who, along with the other pickets, was on the sidewalk in front of the building, ". . . that we should hire more good-looking women to do the picketing." Hart replied, asking Hughes to stop sexually harassing the pickets. Hughes replied with "fuck you" and "things to that effect," and then "Roger Hughes waked down . . . the passage way leading from his office, which crosses the sidewalk where we were picketing, through the driveway and out into the street." However, in his diagram of the incident, Yellig depicted Hughes as going down the front steps, moving diagonally across the front grass, and crossing the sidewalk into the street. Whatever direction in which he moved, upon returning to the sidewalk, Hughes cut in front of Yellig, who was facing him, and approached Torguson, who was facing Cleveland Avenue, from behind.[15] Hughes pushed Torguson's picket sign aside and ". . . sort of hit him, pushed him in the neck. . . . It was not the hardest punch I have ever seen, but it was certainly a violent thrust" and "forceful."

While conceding an incident did occur, Roger D. Hughes portrayed it as an accidental event. As to what occurred, Hughes testified that, on the day of the incident, he drove his truck down Cleveland, turned into Ridgeway, and parked it against the guardrail at the end of the cul-de-sac, "which I do quite often." Then, "I got out of my truck, walked from there over to the driveway" and "went up the approach of my driveway." He then turned right onto the sidewalk, and "I started down the sidewalk to walk down to my office." As he did so, Joe Hart was "maybe 10 feet" from him, and "I said to Joe if had more pickets like this lady here . . . that I wouldn't mind." At this point, Sean _____, who was walking in front of Hughes in the same direction and carrying a picket sign, said "That's sexual harassment. Don't talk to the lady like that. And I told him `to get fucked.'" Sean then suddenly turned around to the right to face Hughes, and, as he did so, "he had his picket sign in his left hand" and ". . . he hit me in the head with the sign."[16] Upon being struck, Hughes ". . . pushed him and said, `. . . watch . . . what you're doing here. . . .' Then I walked up and went into my office." According to Hughes, "I don't think that he knew he was as close as he was when he hit me when he turned around. I don't think he deliberately did it, but he hit me with the sign and I was annoyed. There was no blows . . . that was the end of it." Hughes specifically denied quickening his pace as he moved towards Torguson—"I sure don't get in a hurry to go after a Union guy." However, during

[11] Torguson had his hands in his sweater pockets. He held his picket sign in his left hand, with the handle in his left sweater pocket and the sign across his left shoulder.

[12] Torguson was contradictory on this point, stating during direct examination, he had not yet taken a step toward Cleveland when the battery occurred and stating, during cross-examination, he had taken at least six steps.

[13] Besides himself, Hadzess recalled Torguson, Hart, Dave O'Reilly, Martha DeLeon, Valerie Vasquez, and others picketing that morning.

[14] According to Hadzess, he was just 2 or 3 ft. away from Torguson when Hughes struck him. He added that, as a result of Hughes' impact, Torguson was "spun around" and, almost falling, he had to be caught by another picket.

[15] Yellig was certain that Torguson was carrying his picket sign across his right shoulder.

[16] During cross-examination, Hughes recalled that Sean turned "quickly" to the right.

cross-examination, Hughes contradicted himself when asked why Torguson hit him, "It looked to me like he was frustrated with the yelling and cussing at him . . . . and I was walking behind him."

The second alleged unlawful incident occurred 8 days later on June 21, and involved the arrest and citation of a picket, Sean Yellig, for a misdemeanor offense, urinating in public, at the instigation of Ryan Hughes. The latter testified that, on the morning of the day of the incident, which, he believed, occurred in July or August, he drove his own red Chevrolet truck into the Ridgeway Avenue cul-de-sac and parked directly behind his father's truck, which was parked at the end of the road and facing the 101 Freeway.[17] "[A picket] was standing at the wheel well and I was wondering what he was doing and I jumped out real quick and he turned around and saw me and he zipped his pants up. And I ran around the other side of the vehicle and I walked up there and there was a big [puddle] of urine on the floor . . . and it stunk." Ryan added that he observed the picket standing at the left front of his father's truck, which was parked 6 to 8 ft. from the guardrail and that, when the picket observed him park and open his door, "he zipped up his pants and walked around [the front of his father's truck] and went . . . in between the two vehicles . . . and back over to where everybody was walking." After examining the urine puddle, which he described as bubbly and 16 to 20 inches in diameter,[18] Ryan Hughes walked inside Respondent's office and informed his father of what he had just observed, telephoned Respondent's attorney, and telephoned the Santa Rosa police. During cross-examination, Ryan contradicted himself with regard to what he witnessed when he parked, confirming that he observed a urine stream coming from the picket but that "I didn't see his penis or anything." Ostensibly offering corroboration for Ryan Hughes' account of Sean Yellig's misfeasance was Jack Tilton, the owner of the house next to Respondent's office facility. Tilton, who spends most of his time in his front room, which has a picture window with a unobstructed view of Ridgeway, reading the newspaper, watching television, and tending his three cats, testified that he has observed the Union's picketing and that, one morning in March at approximately 10 or 11 in the morning, he saw a picket urinating "over there by the [guardrail] . . . facing the highway."[19] Tilton added that cars and trucks were parked facing the guardrail, and the picket standing "in front of one of the [vehicles] . . . ." Later, according to him, police arrived, and "I went out and talked to them just out of curiosity;" however, he just said hello, did not ask any questions, and failed to volunteer any information regarding what he had witnessed.[20] Finally, Tilton described the picket as being a male, tall, wearing "bedraggled" clothing, and having long hair.[21] During cross-examination, asked when his attention was drawn to the picket, Tilton explained that ". . . nobody's ever at [the end of the cul-de-sac]. And when anybody moves out there, I notice it because I have an old cat that goes out and lays on a chair and strangers scare the cat. . . . She runs and I can't get her to come in, so I'm always watching because I'm watching for her."

Responding to the call, Santa Rosa police officer, Kenneth Johnson, arrived at 100 Ridgeway at 10:18 that morning. As he turned into the cul-de-sac, he observed approximately seven pickets on the sidewalk in front of the building at the above address. Johnson went up to the door of the building, asked for Ryan Hughes, and the latter came outside. According to Johnson, Hughes ". . . explained to me that he came back and as he parked his truck he saw one of the picketers over next to his other vehicle which is parked . . . right at the guardrail . . . . And he saw the picketer . . . zipping up his pants. He showed me what he thought was a puddle of urine in the pavement in front of the truck."[22] In order to ascertain the nature of the "spot,"[23] Johnson ". . . kneeled down to smell . . . to see what it smelled like," but ". . . it was a pretty hot day, so the most all I could really smell was hot pavement."[24] Arising, Johnson ". . . explained to Mr. Hughes that I didn't see any or didn't smell any urine," Hughes said he wanted the picket arrested, and, as such was Hughes' right, Johnson agreed to do so on that basis. The person, whom Hughes pointed to as the perpetrator, was Sean Yelling, and Johnson walked over to where he was picketing. Yellig denied the allegation, saying that he had no need to do what he was accused of doing as he had just gone to a nearby restaurant in order to use its bathroom. Nevertheless, inasmuch as Hughes insisted, Johnson issued a citation for public urination to Yellig.

As he did to police officer Johnson, while testifying, Sean Yellig specifically denied urinating anywhere on Ridgeway Avenue that morning. He testified that he rode his bicycle to the location of the picketing, parked it at the end of the Ridgeway Avenue cul-de-sac on the far side of the guardrail, and began picketing at approximately 7 a.m. Approximately 45 minutes later, feeling the urge to urinate, he requested permission to leave the picket line, rode his bicycle to Adell's Restaurant, which is located a half-mile from the cul-de-sac, relieved

[17] In his diagram of the scene, Hughes placed the company van as parked just to the right of his father's truck and also facing the freeway.

[18] According to Hughes, the urine puddle was next to but not touching the left front tire of his father's truck.

[19] Tilton stated that the picket was directly in front of the guardrail when he urinated.

[20] Tilton believed the police officer seemed bored by the investigation. Also, while Tilton stated that a police officer went to the location of the alleged urinating, he denied that the officer kneeled down in an effort to test for the smell of urine.

[21] Tilton stated that the picket has since altered his appearance in "the last few months," and that the man now ". . . was all cleaned up. His hair was . . . combed nicely." Tilton also stated that the picket had a bicycle

[22] In his police report, Johnson states that he only observed Yellig zipping up his pants. Contrary to Ryan Hughes, as Johnson diagramed the scene, two trucks were parked head-in to the guardrail and next to each other. He identified the one closest to the sidewalk as Ryan's and the one to its left as a van. The spot of the alleged urine puddle was between the van and the guardrail and on the right side of the van.

[23] Johnson described the spot as being ½ to 2 inches in diameter—"a discoloration in the pavement; a little bit darker than the rest of the pavement."

[24] From his job duties as a police officer, Johnson was familiar with the smell of urine. Also, I note that Johnson noted in his police report that Ryan Hughes reported the incident as occurring at approximately 9 and that he (Johnson) investigated the alleged residue of the urine puddle at least an hour and a half later.

himself, and returned to Ridgeway Avenue. As he had done earlier, he parked his bicycle by lifting it over the guardrail at the end of the cul-de-sac and locking it. According to Yellig, this was in plain view of anyone in the area.[25] He added that there were several vehicles parked at the end of the cul-de-sac with the closest being Roger Hughes' black Chevrolet pick-up, which was 10 ft. from the guardrail, and that "after I finally finished locking up my bike . . . Roger Hughes' son drove up and parked his . . . red truck . . . behind the other parked cars." Hughes' son climbed out of his truck and asked "`what are you doing near my father's truck?'" Yellig testified that he did not respond and merely returned to his picketing duties. A few minutes later, he added, Roger Hughes stepped out of his office building and yelled "`stay the fuck away from my truck. . . . if I find anything wrong with [it], you're going to pay." He then went back inside, immediately stepped outside again, and shouted to Yellig ". . . that his son had videotaped me urinating in the street." Joe Hart then pulled him aside and asked if what Hughes said was true, and Yellig denied it.

Union agent Hadzess corroborated Yellig's version of what occurred. According to him, Yellig did ask permission to leave the picket line that morning in order to use the bathroom at Adell's Restaurant and did ride his bicycle there. He returned 15 minutes later and parked his bicycle across the guardrail at the end of the cul-de-sac. Hadzess testified that he clearly observed Yellig lifting his bike and placing it on the other side of the guardrail and that he was paying attention because Ryan Hughes had just turned into the cul-de-sac from Cleveland at the same time and parked behind another vehicle 10 to 12 feet .from where Yellig was locking his bicycle. Hadzess further testified that Hughes ". . . exited his vehicle and for . . . just a moment looked in the direction of Sean Yellig, turned . . . and walked quickly . . . directly into [Respondent's] office." Then, a half an hour later, Roger Hughes came outside and yelled to Joe Hart, "`You can't have your guys pissing on the bushes over there.'" Both union agents denied that any of the pickets had engaged in such conduct, and Hughes went back into his office. Ten minutes later, he again came outside and ". . . he said that he was going to call the cops. And we said okay. He also said that "I have it on camera I had cameras on you guys 24 hours a day, seven days a week . . . .'" Hughes failed to deny what Hadzess attributed to him. With regard to the citation for public urination, which was issued toYellig, there is no dispute that the Santa Rosa City Attorney declined to issue a complaint or prosecute the charge against Yellig. Further, there is record evidence that the Union incurred legal expenses, consisting of billing from its attorneys for defending Yellig.

The third incident of alleged unlawful conduct, which involved Aaron Hadzess and Ryan Hughes, occurred on November 5. According to Hadzess, he was picketing outside of Respondent's office facility that day along with William Reed,[26] Randy Stewart, Martha DeLeon, and one or two others, and, at approximately 8:30 in the morning, he observed Ryan Hughes turn into Ridgeway in his "red Chevy" pick-up truck and turn again into Respondent's driveway. Hadzess testified that he looked at Hughes long enough to notice he had "jumped" out of his truck but then turned his head to say something to Reed. "All of a sudden I noticed sort of in peripheral vision a movement and I sort of hunched or anticipated in surprise, and . . . I was struck on the right shoulder and spun around and I regained my footing and saw Ryan Hughes . . . about halfway up the walkway . . . moving relatively quickly" toward the office front door. Hedzess added that, at the time of contact, he was walking several feet from the edge of the grass in front of the office and that he did not know which part of Hughes' body struck him. William Reed, who has picketed on behalf of the Union in front of Respondent's office facility since October, testified that he witnessed physical contact between Hadzess and an individual, later identified for him as Ryan Hughes, in the first week of November. According to him, at the time of the incident he had been walking with Hadzess toward Respondent's driveway—"We had just passed the walk to [Respondent's] office when [Roger Hughes'] son drove into the driveway. We were talking about something that we have in common . . . . when [the son] got out of the truck. We wasn't really paying any attention to him until he come around from his truck . . . . And he was walking . . . like he was going to a fire." Reed further testified that he and Hadzess were walking on the part of the sidewalk closest to the grass lawn with the latter on his right and that he really began paying attention to Hughes when ". . . he was coming on our side of the walk" 6 or 7 ft. away from them. "At the time I realized he was going to hit Aaron, he could have went on the grass, but when he got up to Hadzess, he just put out his shoulder . . . and hit . . . Aaron with his shoulder, the right shoulder against Hadzess' right shoulder and knocked Aaron back." Further, Reed described the contact as "a fairly hard hit" and intentional as Hughes might have avoided the contact by stepping onto the grass or by walking around the pickets on the sidewalk. During cross-examination, Reed stated that he has often noticed Hughes walking hurriedly and that, on this occasion, he seemed to be in an "exceptional hurry," walking faster than on most days. Further, asked whether he and Hadzess could have avoided the contact, Reed replied, "Well, I suppose I could have done that . . . . if we would have jumped to the side, we could have avoided contact," but ". . . we didn't know [Hughes] was going to hit [Hadzess]."

Ryan Hughes conceded that such an incident occurred but portrayed it as being, at least, an accident and, at most, the fault of the pickets. According to him, at approximately noon that day, he pulled into the Ridgeway cul-de-sac and, as no vehicles were in the driveway, he turned into it and parked his truck. Carrying a binder in which he had a set of plans in one hand, ". . . I got out and I walked around my truck and I came to the sidewalk and I started heading on the far sidewalk to go up the path."[27] As Ryan walked on the sidewalk, Aaron Hadzess and another picket, an "older man," were in front of him, walking towards him, and they ". . . were walking at an angle and came

[25] Yellig stated that it takes "three minutes" to dismount from the bike, lift it over the guardrail, and lock it, which is a two-step process.

[26] Reed was picketing alongside him.

[27] He meant the side of the sidewalk closest to the grass. He added that he did not cut across the lawn as "there are bushes" and, if one desires to cross the lawn, "you have to climb over the bushes."

on this side of the walk. And as we walked . . . . I kind of looked down and it was kind of like a shoulder bump. So I kind of slowed down. I didn't like really understand why that happened but I decided not to cause a scene. And I just walked up the path . . . ." Hughes added that Hadzess and the other picket had been at the street side of the sidewalk and were walking on an angle, moving toward the grass side, and "I just kind of glanced off for a minute and then I looked up and someone was right there with an arm kind of up." According to Hughes, the two pickets ". . . came right at me and cut off my path."[28]

A. Legal Analysis

As set forth above, the General Counsel alleges Roger Hughes' assault and battery against Eric Torguson, Ryan Hughes' battery against Aaron Hadzess, Roger Hughes' threat to call the police regarding his assertion that Sean Yellig had engaged in public urination, and Ryan Hughes' act of causing the arrest of Yellig for urinating in public were each violative of Section 8(a)(1) of the Act. Clearly, whether any of the above alleged acts and conduct were violative of the Act depends, in great part, upon my resolution of the credibility of the respective witnesses. In this regard, I initially turn to the Hughes/Torguson incident and note that, while Roger D. Hughes failed to impress me as being an entirely veracious witness and was inconsistent in his version of the incident, the witnesses, on behalf of the General Counsel (Torguson, Hadzess, and Yellig) were equally unpersuasive, contradicted each other, and were internally inconsistent in their versions of what occurred. Thus, while Torguson and Hadzess described a verbal exchange between the former and Hughes prior to the latter's alleged assault and battery against Torguson, Yellig mentioned only the words between Joe Hart and Hughes; Hadzess failed to corroborate Torguson that Hughes denominated him "a pansy;" and, while Torguson described Hughes as moving toward him by "running diagonally across the grass," Hadzess diagramed Hughes as coming from his truck, which was parked in the driveway, and on the sidewalk as he "moved quickly" toward Torguson and Yellig pictured Hughes as either walking down the walkway from the front steps or down the front lawn, crossing the sidewalk and going into the street, turning and again stepping back onto the sidewalk, and approaching Torguson. Also, contradicting Torguson, who stated he was aware Hughes was coming toward him and, as a result, turned and started walking in the opposite direction away from the latter, Hadzess testified that Torguson was unaware Hughes was coming after him, and, while Torguson and Hadzess describe the former as holding his picket sign with his left hand and carrying it across his left shoulder, Yellig was certain Torguson was carrying the sign across his right shoulder. Further, Torguson was internally inconsistent in his version of the incident, stating, during direct examination, after seeding Hughes coming toward him and turning toward Cleveland Avenue, he had yet to take a step before being struck by Hughes, and, during cross-examination, he stated he had taken at least half a dozen steps before being struck. Likewise, Hadzess testified inconsistently as to the pace at which Hughes moved after Torguson—describing him variously as walking, walking quickly, moving quickly, running, and, finally, moving like a "charging bull." Based upon the foregoing, while I am certain that, after a verbal exchange between them, some sort of collision between Roger Hughes and Eric Torguson occurred in the morning of June 13, I am unable to credit either Torguson, Hadzess, or Yellig and find that Hughes deliberately charged after and struck Torguson. Accordingly, inasmuch as the essence of the allegation of paragraph 6(a) of the amended consolidated complaint is a deliberate physical attack upon Torguson by Hughes and as I do not believe the credible record evidence supports such a finding, I shall recommend dismissal of said allegation.

With regard to Santa Rosa police officer Johnson's June 21 arrest and citation of Sean Yellig, for public urination, at the behest of Ryan Hughes, I did not find the demeanor of the latter, while testifying, to be that of a candid and forthright witness. In particular, I note the glaring inconsistency between his direct and cross-examination testimony as to what he assertedly observed with regard to Yellig as he parked his truck behind his father's truck on that morning. Thus, according to his direct examination testimony, Hughes observed Yellig by the left front wheel of his father's car with his (Yellig's) back turned but had no idea what he was doing and became aware of the picket's actions only when Yellig ". . . turned around and saw me and he zipped his pants up."[29] However, during cross-examination, Hughes patently embellished his story, stating that, while he could not see the Yellig's penis, he did observe a urine stream pouring from the picket's body. Moreover, while Hughes asserted that the puddle of urine, which he discovered, was rather large, 16 to 20 inches in diameter, the dark "spot" on the pavement, which he pointed out to police officer Johnson as the remnant of the puddle, was no more than a half inch to 2 inches in diameter, and the Santa Rosa police officer failed to detect any odor of urine. Further, while Jack Tilton ostensibly corroborated Hughes, the former, in fact, contradicted him, stating that what he observed was a picket urinating over the guardrail at the end of the Ridgeway cul-de-sac. Also, assuming what Hughes observed occurred at the left front wheel of the truck, owned by Roger D. Hughes, given the fact that two vehicles obscured and essentially blocked his view of Yellig's alleged misconduct, Tilton could not possibly have seen what occurred from inside his house with his attention disrupted by his omnipresent three cats.[30] In the foregoing circumstances, I believe Ryan Hughes dissembled in both his statement to the Santa Rosa police and in his testimony during the instant hearing and is not worthy of credence herein. In contrast to the disingenuous Hughes, Sean Yellig impressed me as being a

[28] There is no record evidence that any employees of Respondent or any other employer were present and witnessed any of the four incidents, alleged as unfair labor practices herein.

[29] This is the same story Hughes told to police officer Johnson.

[30] Despite his age and apparent disinterest in the outcome of these matters, Tilton did not impress me as being a truthful witness. In particular, I am troubled by his admitted failure to inform police officer Johnson about what he allegedly observed. His excuse for not doing so does not ring true, and his failure to do so, in my view, speaks volumes about his veracity.

more candid witness, and I credit his denial of having urinated in the Ridgeway Avenue cul-de-sac on June 21. Therefore, I find merit to the General Counsel's contention that Ryan Hughes instigated the arrest and citation of Yellig by the Santa Rosa police without cause. Finally, in the above regard, Roger D. Hughes failed to deny Aaron Hadzess' testimony that, prior to the arrival of police officer Johnson later that morning, he came out of the office facility and threatened to have Yellig arrested for urinating near his truck. Inasmuch as I do not believe that Yellig engaged in such misconduct, Hughes' threat was without cause.

Regarding the Ryan Hughes/Aaron Hadzess incident on November 5, the demeanor, while testifying, of the latter appeared to be that of the more frank and straightforward witness. Moreover, William Reed, who impressed me as being an honest witness, corroborated Hadzess. Accordingly, I find that, during the morning on the above date, Hughes drove his pick-up truck into the driveway of Respondent's office facility, exited his car, walked hurriedly down the driveway, turned left onto the sidewalk at a time when Hadzess and Reed, who were picketing alongside each other, were walking toward the driveway on the side of the sidewalk closest to the grass. I further find that, rather than avoiding the two pickets, Hughes moved toward them directly in their path, lowered his right shoulder, and collided with the right shoulder of Hadzess, who had been paying no attention to the onrushing Hughes, causing the Union agent to stumble and almost fall to the ground. Having considered the record as a whole, I am convinced that Ryan Hughes' act was deliberate and unprovoked and it was nothing less than a battery against Hadzess.

While I have concluded that Ryan Hughes falsely accused Sean Yellig of urinating in public and thereby instigated his arrest and citation by the Santa Rosa police without cause and that Hughes deliberately collided with Aaron Hadzess while the latter was picketing in front of Respondent's office facility, the issue remains as to whether responsibility for Hughes' acts may be imputed to Respondent. Put another way, did Ryan Hughes, as alleged, act as Respondent's agent? In this regard, counsel for the General Counsel primarily relies upon the Board's decision in *Scotts IGA Foodliner*, 223 NLRB 394 (1976). Therein, the Board concluded that, notwithstanding that he worked for another company, the son of the owner of a family-owned business was an agent of the respondent within the meaning of Section 2(13) of the Act. Id. at 400–401. However, the agent's relationship to the owner was not the sole factor considered by the Board, and, among the other factors considered, were that the son regularly performed work at one of the respondent's stores, that employees were aware of the familial relationship, and that the son's alleged unlawful acts were similar to those committed by supervisors and committed in concert with them. Id. Likewise, in *South Shore Pontiac*, 203 NLRB 928 (1973), the Board concluded that the son of the owner of the respondent was its agent within the meaning of Section 2(13) of the Act, and among the other factors considered by the Board were the son's job as a salesman for the respondent; his job duties, which consisted of opening mail, making bank deposits, and answering customer complaints, and his authority to execute a document, on behalf of the respondent, agreeing to the location of a representation election. Herein, in addition to acting as Respondent's estimator, Ryan Hughes maintains an office with a desk in Respondent's office facility, is in charge of Respondent's materials inventory, performs customer service work, and, according to his father, transmits work instructions to Respondent's craft employees in his father's absence. In these circumstances, especially noting his familial relationship to his father, who operates Respondent as a sole proprietorship, his actions as a conduit of information for employees, and the record as a whole, I believe that, at all times material herein, Ryan Hughes acted as Respondent's agent, within the meaning of Section 2(13) of the Act. *Einhorn Enterprises*, 279 NLRB 576 at 576 (1986); *IGA Foodliner*, supra. Moreover, with regard to the arrest and citation of the picket Yellig, I view Roger Hughes' threat to have Yellig arrested as condonation of his son's actions, rendering him responsible for them. *East Texas Motor Freight*, 262 NLRB 868, 871 (1982). In this regard, I note that, according to Ryan, he spoke to his father immediately upon entering Respondent's office after parking his car and that Roger Hughes threat to inform the police and Ryan Hughes' demand that Yellig be arrested and cited occurred shortly thereafter. Accordingly, in the above circumstances, I find that Respondent has been, and continues to be, responsible for the above-described acts and conduct of Ryan Hughes.

Having found that, on June 21, Roger D. Hughes threatened the arrest of Sean Yellig without cause and a Santa Rosa police officer issued a citation, for public urination, to Sean Yellig at the behest of Ryan Hughes, who fabricated the incident and that, on November 5, Ryan Hughes deliberately collided with Aaron Hadzess at a time when the latter was picketing and paying no attention to the onrushing Hughes, the issue, of course, is whether Respondent's acts and conduct were violative of Section 8(a)(1) of the Act. Initially, in this regard, I agree with counsel for the General Counsel that a labor organization has a legitimate interest in protecting the employment standards, which it has negotiated, from the unfair competitive advantage, which would be enjoyed by an employer whose labor costs are less than those of signatory employers and that "properly conducted area standards picketing" constitutes activity protected by Section 7 of the Act. *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978); *Petrochem Insulation, Inc.*, 330 NLRB 47, 49 (1999); *Giant Food Markets, Inc.*, 241 NLRB 727, 729 (1979). Herein, the signs, which have been carried by the Union's pickets who are marching on the sidewalk in front of Respondent's office facility on Ridgeway Avenue, protest the wage rates, which Respondent pays to its employees and which, the Union contends, are beneath its area standard, and, thus, the Union's picketing was clearly for the area standards objective of ". . . protecting the economic terms of employment, enjoyed by the employees [it represents]." *Petrochem Insulation, Inc.*, supra.[31] Based upon the above-

[31] In his posthearing brief, counsel for Respondent contends that the Union's agents failed to perform the "prerequisite investigation" to determine what the true area standard was. However, the record evidence is that union agents Hadzess and Hart viewed pay stubs for Respondent's employees and compared their wage rates to those set forth in the Union's master labor agreement for the northern California area, and the Board has determined that such an investigation is sufficient to

described legal principle, counsel for the General Counsel proffers the legal theory, for finding Respondent's acts and conduct violative of the Act that, inasmuch as the Union's area standards picketing was protected by Section 7 of the Act, the individuals, who engaged in picketing on behalf of the Union and who were themselves employees within the meaning of the Act, likewise engaged in conduct, protected by Section 7 of the Act, and that, therefore, they ". . . were entitled in their own right not to be subjected, as they were, to the chilling effect of witnessing or being the object of clearly coercive [conduct]." In this regard, counsel notes that the Section 2(3) definition of employee includes all employees and not just those of any particular employer. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). Having carefully considered it, I believe counsel's legal theory, underlying the alleged violations of the Act, is without merit.

At the outset, I note that none of the Board and court decisions, upon which the General Counsel relies, involve employer actions, not specifically related to the protected concerted activity, perpetrated against individual pickets or handbillers; rather, each concerns employer action directly against a labor organization concerning a protected concerted activity in which the labor organization had been involved. Thus, in *Winco Foods, Inc.*, 337 NLRB 289 (2001), *Indio Grocery Outlet*, 323 NLRB 1138 (1997), and *Bristol Farms*, 311 NLRB 437 (1993), employers attempted to exclude groups of nonemployee representatives of unions from engaging in area standards picketing or consumer handbilling on their respective properties. Further, in *Petrochem Insulation, Inc.*, supra, and, in *BE & K Construction Co*., 329 NLRB 717 (1999), employers filed lawsuits to enjoin unions from engaging in area standards picketing; in *Diamond Walnut Growers*, 312 NLRB 61 (1993), the employer filed a retaliatory lawsuit for libel against a union involving the latter's promotion of a consumer boycott against the employer; and, in *Dahl Fish Co*., the employer filed a lawsuit against a union in retaliation for the latter's filing of an unfair labor practice charge against the employer. Given that labor organizations exist for the purpose of representing employees, such coercive employer conduct, directly against labor organizations and related to protected activities in which the labor organizations may be engaged, clearly and symbolically detrimentally interferes with the rights of employees, who are represented by the affected unions, and those of other employees "even if those individuals' interests are not congruent with, and even may be antithetical to, the interests of the [represented employees] . . . ." *BE & and K Construction Co.*, supra at 935. In contrast, the instant matters concern Respondent's acts and conduct against individual pickets, one employee/agent of the Union and the other a "nonemployee representative," who was compensated by the Union for picketing, and there is no record evidence that any of Respondent's acts were directly related to, or in retaliation for, the Union's area standards picketing.[32] Moreover, contrary to the General Counsel, other than Joe Hart and Aaron Hadzess, rather than working as employees, within the meaning of Section 2(3) of the Act, the nonemployee representatives, who have engaged in picketing on the public sidewalk outside Respondent's office facility on behalf of the Union, are more akin to agents, hired and paid for one specific purpose—picketing. On this point, I note that, in its decisions, the Board consistently refers to such individuals as "representatives" or "agents" of the picketing or handbilling union and never as its employees or as employees in the generic sense. *Winco Foods, Inc*., supra, at slip. op. 1 and 4; *Indio Grocery Outlet*, supra at 1138 and 1141–1142; *Bristol Farms*, supra at 437–438; *Payless Drug Stores*, 311 NLRB 678, 679 (1993). Also, in this regard, I note that the Section 7 right to engage in lawful area standards picketing belongs to the Union, and that, while a labor organization's pickets obviously are engaged in the protected activity, their protection, under the Act, is derivative of the labor organization's Section 7 right. In these circumstances, unlike an attack upon the labor organization itself, I can see nothing symbolic about an act directly perpetrated against a picket for reasons not clearly related to the protected activity itself. Accordingly, contrary to the General Counsel, I do not believe that the nonemployee union representatives, who have engaged in the instant area standards picketing on behalf of the Union, are employees, within the meaning of Section 2(3) of the Act, always "entitled in their own right not to be subjected . . . to the chilling effect of witnessing or being the object of clearly coercive [conduct]," or that deliberate acts of misfeasance, perpetrated directly against such nonemployee union representatives necessarily detrimentally impact upon the Section 7 rights of employees generally.[33]

Notwithstanding the foregoing, I do believe that, in certain circumstances, deliberate misconduct, directed against nonemployee representatives, who are engaged in protected concerted activities on behalf of a labor organization, may constitute conduct violative of Section 8(a)(1) of the Act. Thus, the Board and the courts have held that, when witnessed by one or more employees, coercive acts directed at the above-described individuals, are violative of the Act. In this regard, in *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1365 (7th Cir. 1983), while

establish the legitimacy of a labor organization's assertion that an employer does not meet its area standards. *Carpenters (Douglas Co.)*, 322 NLRB 612 fn. 2 (1996). Further, counsel asserts that the handbills, which were distributed by the Union at jobsites on which Respondent worked, rather than protesting area standards were designed to inflame the employer and harm its reputation in the community. However, contrary to counsel, at least two of the handbills did, in fact, contain an area standards message, and Respondent presented no evidence that the messages, set forth on the other handbills, was false. Thus, the Board had issued a complaint against Respondent, and Roger Hughes failed to deny the lewd conduct, attributed to him, at the hearing.

[32] While there is record evidence suggesting that Respondent's attitude toward the picketing generally was rather supercilious and antipathetic, there is no specific record evidence of motive underlying Respondent's alleged unlawful acts and conduct. While, of course, I recognize that motive is irrelevant for establishing alleged violations of Sec. 8(a)(1) of the Act, I note that counsel for the General Counsel spent considerable time exploring Respondent's attitude toward the Union and its picketing.

[33] I recognize that, in *Indio Grocery Outlet*, supra, the respondent demanded that police arrest a picket, who refused to leave its property, and that the Board found this to be violative of Section 8(a)(1) of the Act. However, the respondent's demand that police arrest the individual was directly related to its demand that the Union cease picketing on its property.

leafleting outside of a plant near employees, agents of the respondent attacked a representative of a Union; in *Batavia Nursing Inn*, 275 NLRB 886, 889 (1985), immediately prior to the counting of ballots after a representation election, while employees were present, the attorney for the respondent punched a representative of the union; in *Kelco Roofing*, 268 NLRB 456, 463 (1983), in the presence of employees at the entrance to the plant, the respondent's president repeatedly bumped a union agent, who was soliciting employees to sign authorization cards; and, in *Martin Arsham Sewing Co.*, 244 NLRB 918, 922 (1979), during a strike in the presence of employees, the owner of the respondent struck a union agent in the head with his fist. I believe that, in order for the Board to have concluded that the above-described coercive acts and conduct were unlawful, a necessary element of proof in each of the above cases was the presence of the respondent's employees at the time of each coercive act. Thus, the gravamen of the unfair labor practices found in the above Board decisions is that ". . . onlooker[s] would likely infer from the [coercive acts] that the employer[s] would also retaliate in some fashion against an employee who supported the union." *Batavia Nursing Inn*, supra at 891. Herein, no such conclusion may be drawn as, notwithstanding the deliberate and, perhaps, coercive nature of Respondent's acts and conduct, none of its employees or employees of any other employer were present and witnessed what occurred. In these circumstances, I do not believe that Respondent's acts, however intentional, calculated, and reprehensible, constituted unfair labor practices, within the meaning of Section 8(a)(1) of the Act, and I shall, therefore, also recommend dismissal of paragraphs 6(a), (c), and (d) of the amended consolidated complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent committed no unfair labor practices.

ORDER

IT IS HEREBY ORDERED that the amended consolidated complaint be, and the same hereby is, dismissed in its entirety.

Dated June 13, 2003